IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34145

STATE OF IDAHO,	)	
	)	**2008 Opinion No. 93**
Plaintiff-Respondent,	)	
	)	**Filed: November 3, 2008**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
MELANIE LAMPIEN,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Judgment of conviction and unified sentence of five years, with a minimum period of confinement of three years, for harboring a felon, affirmed.

Thompson, Smith, Woolff & Anderson, Idaho Falls, for appellant. Stevan H. Thompson argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

PERRY, Judge

Melanie Lampien appeals from her judgment of conviction and sentence for harboring a felon. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

In late August 2006, several law enforcement and probation and parole officers went to Lampien's apartment looking for her husband, Nicholas McKenna. Based on conversations with McKenna's probation officer, Lampien had known since at least June that McKenna was wanted for outstanding felony probation violations and for questioning regarding several recent burglaries in the area. Although Lampien knew that McKenna was hiding in the apartment, Lampien met the officers outside her apartment and told them that she had not seen McKenna and did not know his whereabouts. The officers informed Lampien that, if it was discovered that she was harboring McKenna or assisting him in avoiding arrest, she would be charged for her

actions. Lampien continued to deny knowledge of McKenna's whereabouts. Suspecting McKenna was in the apartment and not believing Lampien's statements to the contrary, approximately an hour later two police officers and two probation and parole officers entered Lampien's apartment without their weapons drawn. Once inside the apartment, the officers were confronted by McKenna, who brandished a firearm. A struggle ensued and one of the police officers and the two probation and parole officers were injured by gun shots. McKenna died during the struggle.

The state charged Lampien with harboring a felon. I.C. § 18-205. A nonbinding plea agreement was reached whereby Lampien would plead guilty and the state would recommend probation and would not oppose a withheld judgment. Lampien entered a guilty plea and proceeded to sentencing. At Lampien's sentencing, the district court allowed the police officer and the two probation and parole officers who were shot to give victim impact statements over Lampien's objection. The officers advocated that Lampien receive a prison term, largely because they did not believe Lampien when she stated that she did not know McKenna possessed a gun and in order to deter others from harboring felons. The district court sentenced Lampien to a unified term of five years, with a minimum period of confinement of three years. Lampien filed an I.C.R. 35 motion for reduction of sentence, which the district court denied. Lampien appeals, challenging the charging information, the officers' victim impact statements, and the excessiveness of her sentence.

II.

ANALYSIS

A. Defective Information

Lampien argues that the charging information filed in her case was defective because it did not contain all of the necessary elements for proving a violation of I.C. § 18-205[1] and, therefore, her guilty plea should be set aside. Specifically, Lampien contends that the statute

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[1] Idaho Code Section 18-205 provides:

> All persons are accessories who, having knowledge that a felony has been committed:
>
> . . . .
>
> (2) Harbor and protect a person who committed such felony or who has been charged with or convicted thereof.

requires that McKenna, in order to be a wanted felon, must have committed a new felony offense. Instead, however, the information alleged that McKenna was wanted for outstanding felony probation violations. Because Lampien did not object to the information before pleading guilty, she also argues that Idaho Criminal Rule 12 should be interpreted to allow her to attack the sufficiency of the information for the first time on appeal. The state counters that Lampien's challenge to the sufficiency of the information may not be raised for the first time on appeal, that Lampien waived this claim by entering a guilty plea, and that Lampien has not raised a jurisdictional challenge.

Whether a court lacks jurisdiction is a question of law, over which this Court exercises free review. *State v. Jones*, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004) (*Jones*). In a criminal case, the filing of an information alleging that an offense was committed within the State of Idaho confers subject matter jurisdiction. *Id.* at 757-58, 101 P.3d at 701-02. Because the information provides subject matter jurisdiction to the district court, the jurisdictional power depends on the charging document being legally sufficient to survive challenge. *Id.* at 758, 101 P.3d at 702. Whether a charging document conforms to the requirements of law and is legally sufficient is also a question of law subject to free review. *Id.*

A challenge asserting the charging information is jurisdictionally deficient is never waived and may be raised at any time, including for the first time on appeal. *Id.* at 758, 101 P.3d at 702. If an alleged deficiency is raised by a defendant before trial or entry of a guilty plea, the charging document must be found to set forth all facts essential to establish the charged offense to survive the challenge. *State v. Halbesleben*, 139 Idaho 165, 168, 75 P.3d 219, 222 (Ct. App. 2003). When the information's jurisdictional sufficiency is challenged after trial, it will be upheld unless it is so defective that it does not, by any fair or reasonable construction, charge the offense for which the defendant was convicted. *Jones*, 140 Idaho at 759, 101 P.3d at 703; *State v. Robran*, 119 Idaho 285, 287, 805 P.2d 491, 493 (Ct. App. 1991). A reviewing court has considerable leeway to imply the necessary allegations from the language of the information. *Jones*, 140 Idaho at 759, 101 P.3d at 703; *Robran*, 119 Idaho at 287, 805 P.2d at 493. In short, when considering a post-trial challenge to the jurisdictional sufficiency of the information, a reviewing court need only determine that, at a minimum, the information contains a statement of the territorial jurisdiction of the court below and a citation to the applicable section of the Idaho Code. *State v. Quintero*, 141 Idaho 619, 622, 115 P.3d 710, 713 (2005).

Idaho Criminal Rule 12 provides, in pertinent part:

> (b) Pretrial motions. Any defense objection or request which is capable of determination without trial of the general issue may be raised before the trial by motion. The following must be raised prior to trial:
>
> . . . .
>
> (2) Defenses and objections based on defects in the complaint, indictment or information (other than it fails to show jurisdiction of the court or to charge an offense which objection shall be noticed by the court at any time during the pendency of the proceedings).

Objections to the sufficiency of a charging document based on due process grounds are waived unless raised before trial. *Jones*, 140 Idaho at 758, 101 P.3d at 702. In *Jones*, the defendant entered a plea of guilty. On appeal, Jones contended that the information was deficient because it failed to charge an offense. Jones argued the information failed to charge an offense because it omitted a material element of the crime. The Idaho Supreme Court concluded that, when a challenge to the sufficiency of an information is not raised until after entry of the judgment, if the applicable code section is named in the charging document its language may be read into the text of the charge. *Id.* at 759, 101 P.3d at 703. Therefore, the Court concluded that Jones had waived a due process challenge to the information and that the information was sufficient to confer jurisdiction. *Id.* at 758-59, 101 P.3d at 702-03.

On appeal, Lampien asserts that the information did not charge an offense because it omitted a material element of I.C. § 18-205. The facts of this case are indistinguishable from *Jones.* In this case, no challenge was made to the information before Lampien pled guilty. Therefore, any argument as to the insufficiency of the information on due process grounds was waived by lack of a timely objection before the district court. Furthermore, because the information contained a statement of the territorial jurisdiction of the court below and the statutory code section, we conclude that the information was sufficient to charge an offense and convey jurisdiction in the district court. Lampien's argument to the contrary is without merit.

B. Officers' Victim Impact Statements

Lampien makes several arguments regarding the officers who made victim impact statements at her sentencing hearing. First, Lampien argues that it was an abuse of discretion and created a manifest injustice pursuant to I.C. § 19-5306 for the district court to allow the officers to make victim impact statements at Lampien's sentencing. The state counters that Lampien has failed to demonstrate error in the district court's decision that the officers were

victims and, additionally, a sentencing court is allowed to consider a broad range of information when fashioning an appropriate sentence.

A sentencing judge may properly conduct an inquiry broad in scope, largely unlimited, either as to the kind of information he or she may consider or the source from which it may come. *Williams v. New York*, 337 U.S. 241, 247 (1949); *State v. Chapman*, 120 Idaho 466, 470, 816 P.2d 1023, 1027 (Ct. App. 1991); *State v. Bivens*, 119 Idaho 119, 120, 803 P.2d 1025, 1026 (Ct. App. 1991). Support for such a broad inquiry during sentencing is also found in I.C. § 19-5306. *Chapman*, 120 Idaho at 470, 816 P.2d at 1027.

Idaho's victims' rights statute, I.C. § 19-5306, provides, in pertinent part:

> (1) Each victim of a criminal or juvenile offense shall be:
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> . . . .
>
> (e) Heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration, placing on probation or release of the defendant unless manifest injustice would result.

The statute defines "victim" as "an individual who suffers direct or threatened physical, financial or emotion harm as the result of the commission of a crime or juvenile offense." I.C. § 19-5306(5)(a). "Criminal offense" is defined as "any charged felony or a misdemeanor involving physical injury, or the threat of physical injury, or a sexual offense." I.C. § 19-5306(5)(b).

Lampien asserts that the crime she pled guilty to did not "involve her commission or attempt to commit any violent crime against the [officers] who testified at the time of her sentencing. Nor is she charged as an accomplice to the violent crime that was committed by McKenna." Lampien also argues that allowing the officers to advocate a harsher sentence created "manifest injustice" because she did not receive the sentence that the prosecution agreed to recommend. There is no requirement in I.C. § 19-5306 that the crime be a violent crime. Furthermore, at Lampien's change of plea hearing the district court stated, "by lying to the law enforcement officers, you obviously put them at risk." The district court also concluded at sentencing that Lampien's lying to the officers allowed them to walk into an ambush without their weapons drawn and her actions "set the whole chain of events into motion."

The record reveals that McKenna had escaped from his probation officer several months prior to the incident here and that Lampien was present during McKenna's escape. McKenna escaped from the back of a patrol car on foot in handcuffs when his probation officer turned momentarily to speak with Lampien. After McKenna's escape from his probation officer,

Lampien encouraged McKenna to turn himself in. On one occasion, Lampien attempted to drive McKenna to his probation officer's workplace. McKenna jumped from the moving vehicle and injured himself. On another occasion, McKenna shot himself in the leg in Lampien's presence to dissuade her attempts to get McKenna to speak with his probation officer. Lampien was aware that McKenna was unstable and willing to go to extreme measures to avoid capture. Furthermore, Lampien was also aware that McKenna owned a firearm. Although Lampien asked McKenna to get rid of the firearm, she did not know for sure whether McKenna had complied with her request. Lampien did not convey any of the information to the officers regarding McKenna's unstable condition, his prior self-inflicted injuries to avoid capture, or his possession of a firearm prior to the incident that culminated in McKenna's shooting of the three officers.

At Lampien's sentencing, McKenna's probation officer testified that Lampien hid and assisted McKenna for over two months prior to the incident. One of the officers who was shot testified that the officers would have done things differently if Lampien had told them McKenna had or did formerly have a firearm. The other officer who was shot testified that he knows the outcome would have been different if Lampien had been truthful with the officers. The officers who were injured in this incident suffered both direct and threatened harm as well as emotional harm because of Lampien's lie to the officers about McKeanna's presence in her apartment, her failure to inform the officers of McKenna's unstable mental and emotional state and prior possession of a firearm, and her protection of McKenna. Furthermore, Lampien's lie, her failure to convey pertinent information, and her protection of McKenna led officers to enter her apartment without their weapons drawn. As noted by the district court at Lampien's sentencing:

> We do know that by your lying to the police, they walked into an ambush. You let them walk into an ambush. They did not have their guns drawn when they went in there. . . .
>
> So, by your inaction, you let these three officers walk into an ambush. There is no other way to look at this.

Lampien has not demonstrated error in the district court's conclusion that the officers were victims of her criminal offense.

In addition, I.C. § 19-5306 is designed to protect the victim's rights, not the defendant's rights. Given the largely unlimited scope that is allowed at sentencing as to the kind of information or the source from which that information may come, Lampien has not demonstrated

that the district court abused its discretion or created a manifest injustice by allowing the officers to make victim impact statements at her sentencing.

Next, Lampien argues that she should be allowed to withdraw her guilty plea because the plea agreement was breached when officers advocated a harsher sentence at Lampien's sentencing hearing. Lampien bases her argument on the theory that the officers were acting as agents of the prosecutor and, therefore, the officers' recommendations breached the prosecutor's plea agreement.

It is well established that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262 (1971). This principle is derived from the Due Process Clause and the fundamental rule that, to be valid, a guilty plea must be both voluntary and intelligent. *Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984); *State v. Rutherford*, 107 Idaho 910, 913, 693 P.2d 1112, 1115 (Ct. App. 1985). If the prosecution has breached its promise given in a plea agreement, whether that breach was intentional or inadvertent, it cannot be said that the defendant's plea was knowing and voluntary, for the defendant has been led to plead guilty on a false premise. *State v. Jones*, 139 Idaho 299, 301-02, 77 P.3d 988, 990-91 (Ct. App. 2003) (*Jones I*). In such event, the defendant will be entitled to relief. *State v. Fuhriman*, 137 Idaho 741, 744, 52 P.3d 886, 889 (Ct. App. 2002). As a remedy, the court may order specific performance of the agreement or may permit the defendant to withdraw the guilty plea. *Santobello*, 404 U.S. at 263; *Jones I*, 139 Idaho at 303, 77 P.3d at 991.

The prosecution's obligation to recommend a sentence promised in a plea agreement does not carry with it the obligation to make the recommendation enthusiastically. *United States v. Benchimol*, 471 U.S. 453, 455 (1985); *Jones I*, 139 Idaho at 302, 77 P.3d at 991. A prosecutor may not circumvent a plea agreement, however, through words or actions that convey a reservation about a promised recommendation, nor may a prosecutor impliedly disavow the recommendation as something that the prosecutor no longer supports. *Jones I*, 139 Idaho at 302, 77 P.3d at 991. Although prosecutors need not use any particular form of expression in recommending an agreed sentence, their overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse. *Id.*

The prosecutor does not breach a plea agreement by indicating at sentencing that there is someone who would like to address the court and that person then advocates a sentence inconsistent with the terms of the agreement. *State v. Jones*, 141 Idaho 673, 675, 115 P.3d 764, 766 (Ct. App. 2005) (*Jones II).* In *Jones II*, the prosecutor told the sentencing court that the victim's mother would like to make a statement, and then the victim's mother advocated a harsher sentence than that contained in the plea agreement. On review, this Court determined that, because the record did not support the conclusion that the victim's mother was presenting testimony at the initiation of or on behalf of the state, the prosecutor did not act contrary to the plea agreement. *Id.* at 675-76, 115 P.3d at 766-67.

In this case, the prosecutor did not make any statements that were fundamentally at-odds with the plea agreement. In fact, the prosecutor made such statements as: "I'm not trying to justify her actions; I'm just describing the situation the way I see it," "I believe her when she says she didn't think [McKenna] had a weapon," and "in my opinion, we have a young lady here that I don't think we are going to see in the criminal justice system to any great extent--probably ever again." Furthermore, as in *Jones II*, in this case the prosecutor stated that several officers "would like to make a statement to the Court." There is no indication in the record that the officers were speaking at the initiation of or on behalf of the state. However, Lampien asserts that the officers were agents of the state and, therefore, when they recommended a sentence that was harsher than the plea agreement, the agreement was breached.

Idaho appellate courts have not addressed this issue. However, several states have concluded that a plea agreement is not breached by the state when an officer advocates a harsher sentence than that agreed upon by the prosecution and the defendant. *See, e.g. State v. Rogel*, 568 P.2d 421, 423 (Ariz. 1977) (holding that the "provision requiring the State to stand mute on sentencing . . . refers to and binds only the county prosecutor and was not intended to prohibit police officers from airing their opinions"); *State v. Bowley,* 938 P.2d 592, 600 (Mont. 1997) (concluding that "when a probation officer recommends a sentence different from that contained in a plea agreement [it] does not constitute a breach of the plea agreement by the prosecutor because the probation officer's recommendation is not equivalent to the prosecutor's recommendation"); *State v. Thurston,* 781 P.2d 1296, 1300 (Utah Ct. App. 1989) (holding that "the investigating police department is not bound in making sentencing recommendations by a plea bargain agreement entered into by the prosecutor"); *State v. Sanchez* 46 P.3d 774, 779

(Wash. 2002) (rejecting defendant's agency analysis because the only parties to a plea agreement are the prosecutor and the defendant).

Although we acknowledge there is authority to the contrary which states that officers are bound by sentencing recommendations in a plea agreement, in this case the district court concluded that the officers were also victims, a conclusion Lampien has failed to show the district court erred in making. Therefore, we decline to conclude that the officers, in their dual role as investigating officers and victims, breached the plea agreement in this case by advocating a harsher sentence.

C. Sentence Review

Lampien asserts that the district court abused its discretion in sentencing her to a unified term of five years, with a minimum period of confinement of three years, for harboring a felon. The state counters that, although some mitigating factors are present in this case, Lampien has failed to show that the district court's view of the case was unreasonable.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Lampien argues that her sentence is excessive because this is her first conviction, it is unlikely she will commit another crime, she did not contemplate her actions would cause harm, and she acted under strong provocation. Although all of these mitigating factors may be true, the

district court expressed serious concern about the injuries that resulted from Lampien's actions and concern with deterring others from harboring felons. At sentencing, the district court articulated:

> Now, there has to be punishment here to deter you and others from engaging in this type of conduct again. Our citizens have to know that if they're harboring a wanted felon, there is going to be some consequences for this. You can't just do this and expect no punishment.
>
> I think this plea agreement is ridiculous. No jail time? No jail time be imposed? I mean, people have to know there [are] going to be consequences if you harbor a wanted felon from law enforcement. These people have jobs to do; they have to put bad guys behind bars when they break laws. And it's a--many times a thankless and certainly a dangerous job.
>
> I have to consider protection of society, and, of course, your rehabilitation. Now, ma'am,--and I know your emotions that day must have been quite strained, but you knew--you knew they were looking for him and you knew that before, I guess, he came back this time.
>
> So you knew the police were looking for him, and you let him stay with you. And, like I say, by lying to them you set the whole chain of events into motion. You caused Mr. McKenna--you caused the situation where Mr. McKenna was killed. You caused the situation where three law enforcement officers were shot. It doesn't get any more serious than this.

The district court was aware of the goals of sentencing and determined that a prison sentence was necessary to achieve those goals. Based on our independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest, we cannot conclude the district court abused its discretion in sentencing Lampien to a unified term of five years, with a minimum period of confinement of three years, for harboring a felon.

III.
CONCLUSION

Lampien did not object to the charging information before pleading guilty and, therefore, we conclude the information was sufficient to charge an offense and convey jurisdiction. The district court did not abuse its discretion or create a manifest injustice, nor was the plea agreement breached by allowing the officers to make victim impact statements and advocate for a harsher sentence at Lampien's sentencing. The district court did not abuse its discretion in sentencing Lampien to a unified term of five years, with a minimum period of confinement of

three years, for harboring a felon. Accordingly, Lampien's judgment of conviction and sentence for harboring a felon is affirmed.

Chief Judge GUTIERREZ, **CONCURS.**

Judge LANSING, **DISSENTING**

I concur in Section II(A) of the majority opinion, but dissent as to Sections II(B) and (C). Because I believe that the sentencing recommendations made by the law enforcement officers at Lampien's sentencing hearing were not victim impact statements and violated Lampien's plea agreement with the State, I would vacate the judgment and remand to allow resentencing or withdrawal of Lampien's guilty plea.

At the time of her arrest, Lampien was thirty-three years old and had no prior criminal record. Uncontroverted evidence indicated that she had previously attempted to convince her husband, Nicholas McKenna, to turn himself in to his probation officer but, as she was trying to drive McKenna to meet with the probation officer, he jumped out of her moving vehicle. On another occasion when she pleaded for him to turn himself in, McKenna shot himself in the leg to garner Lampien's sympathy and dissuade her from further efforts to make him surrender. Evidence also indicated that she had asked McKenna to get rid of his weapon and McKenna told her that he had done so.

When officers came to Lampien's residence to arrest McKenna on warrants for probation violations, she lied and told the officers that he was not in the residence. That was the act of harboring a felon for which she was charged and to which she pleaded guilty. She was not asked--and did not lie to the officers about--whether McKenna was armed. The officers did not believe Lampien's claim that McKenna was not at home, and they therefore entered the home anyway in search of him. Lampien's lie to the officers caused neither their entry nor the ensuing shootings.

Lampien pleaded guilty to the charge of harboring a felon under a plea agreement by which the State agreed to recommend that Lampien be placed on probation and further agreed not to oppose her request that the court withhold judgment. The prosecutor adhered to this agreement at the sentencing hearing and the presentence investigator likewise recommended that Lampien be placed on probation. The prosecutor also acknowledged that he believed Lampien's claim that she did not know that McKenna still possessed a firearm when the officers entered her house. Then, over defense objection, the court allowed the police officer and two probation

officers who were shot in the confrontation with McKenna to present statements, including their own sentencing recommendations, as crime victims under the Victim's Rights Amendment, Article I, Section 22 of the Idaho Constitution, and Idaho Code § 19-5306. The officers requested that Lampien be sentenced to prison. In my view, the district court erred in permitting the officers to make these sentencing recommendations, which were inconsistent with the State's promised sentencing recommendation under the plea agreement.

First, in my view, although these officers were certainly victims of McKenna's crimes, having been shot by him, they were not victims of *Lampien's* crime entitled under Idaho's victims' rights laws to present their unsworn statements and recommendations for her sentence. Under Article I, Section 22 of the Idaho Constitution and I.C. § 19-5306(e), victims of a criminal offense are entitled to be heard, upon request, in certain criminal justice proceedings, including the sentencing hearing. The constitutional provision allows the legislature to define "crime victim" by statute, and the legislature has done so in I.C. § 19-5306(5). That subsection defines "victim" as follows:

> (a) "Victim" is an individual who suffers direct or threatened physical, financial or emotional harm *as the result of the commission of a crime* or juvenile offense . . . .

(Emphasis added.) Applying this definition, the officers here were not "victims" of Lampien's criminal offense because their injuries were not a result of her offense.

The only offense for which Lampien was charged or convicted was harboring a felon by misrepresenting to the officers that McKenna was not in the home. It has never been alleged that she lied to the officers about McKenna being armed, that she furnished the firearm to McKenna, or that she otherwise knew of or facilitated his plan to shoot at the officers. When she pleaded guilty, she had not been put on notice by the charging information, or any other source, that she would be sentenced as if she had committed such uncharged misconduct. The officers' and the court's speculation that Lampien must have known that McKenna still possessed a gun is pure conjecture and is certainly not reflected in the charge that was made against her. Shooting the officers was McKenna's crime, not Lampien's. The fact that McKenna could not be prosecuted for his outrageous actions because he died during the confrontation does not justify shifting responsibility for his offenses onto Lampien.

I also find no logic in the trial court's conclusion that Lampien is indirectly responsible for the officers' injuries because they would have exercised greater care and been more self-

protective in searching for McKenna (perhaps going in with guns drawn) if Lampien had truthfully told the officers that he was inside. Here, the officers went in to make an arrest of McKenna precisely because they did *not* believe Lampien and suspected that McKenna was hiding in the home. I see no reason why greater caution naturally would have been exercised if the officers had been certain, instead of just suspecting, that McKenna was inside.

Lampien's criminal offense was a serious one, but under the I.C. § 19-5306(5)(a) definition of "victim," the police officers were not victims of the only offense to which she pleaded guilty because their injuries did not result from that offense. Accordingly, the officers' statements and sentencing recommendations at Lampien's sentencing hearing were not authorized as victim statements under I.C. § 19-5306 and Article I, Section 22 of the Idaho Constitution.

Having determined that the officers were not entitled to make their sentencing statements and recommendations pursuant to the victim rights laws, it is necessary to consider whether their statements at the sentencing hearing were otherwise permissible or, instead, violated the plea agreement made by the prosecutor. As the majority opinion acknowledges, a prosecutor's promises under a plea agreement are solemn obligations that must be fulfilled because otherwise defendants could be led to plead guilty based on a false premise. This rule is grounded in due process, and a material breach of a plea agreement, even if inadvertent, will entitle the defendant to relief. *Santobello v. New York*, 404 U.S. 257 (1971); *State v. Wills*, 140 Idaho 773, 102 P.3d 380 (Ct. App. 2004); *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985).

Whether a prosecutor's promise to make a particular sentencing recommendation is violated when a law enforcement officer requests a harsher sentence is an issue not previously addressed by the Idaho appellate courts and on which other jurisdictions disagree. The majority opinion follows those states holding that a plea agreement promising a particular sentencing recommendation does not restrain officers of the investigating police department who wish to express a contrary recommendation. I, however, find more persuasive the opposite reasoning--that a prosecutor's promise in a plea agreement binds the State, not just the prosecutor, and therefore may not be circumvented by police officers who may be unsatisfied with the prosecutor's agreement.

The Florida Supreme Court so held in *Lee v. State*, 501 So.2d 591, 595 (Fla. 1987). The court there concluded that the prosecutor's plea agreement to recommend probation and remain

silent as to whether the sentencing court should "withhold adjudication of guilt" was breached when a law enforcement agent's recommendation of incarceration was submitted to the court. The Florida court said:

> [O]nce a plea bargain based on a prosecutor's promise that the state will recommend a certain sentence is struck, basic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state's recommendation. . . . Regardless of how a recommendation counter to that bargained for is communicated to the trial court, once the court is apprised of this inconsistent position, the persuasive effect of the bargained for recommendation is lost.

Id. The Wisconsin Court of Appeals followed this Florida precedent in *State v. Matson*, 674 N.W.2d 51 (Wis. Ct. App. 2003), saying:

> Investigating officers are so integral to the prosecutorial effort that to permit one to undercut a plea agreement would, in effect, permit the State to breach its promise. If the prosecutor is obligated to comply with, [sic] plea bargain promises, then the prosecutor's investigating officers may not undercut those promises by making inconsistent recommendations. We conclude that statements of the investigating officer for purposes of the sentencing hearing are the statements of the prosecutor. A prosecutor may not undercut a plea agreement directly or by words or conduct. Nor may he do so by proxy.

Id. at 57-58. A similar decision was reached in *State v. Chetwood*, 170 P.3d 436, 441 (Kan. Ct. App. 2007), where a community corrections officer sought a harsher sentence than that which the prosecutor agreed to recommend.

Here, the prosecutor scrupulously abided by his agreement to recommend probation, but this recommendation was severely diluted by the officers' advocacy of imprisonment for Lampien. Lampien was thereby deprived of the principal benefit for which she bargained in the plea agreement. I would therefore hold that she is entitled to relief and that on remand the district court should either allow Lampien to withdraw her guilty plea or provide a new sentencing hearing before a different judge who has not been exposed to the officers' recommendations.